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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

NO. 283

RAILROAD COMMISSION OF TEXAS, ET AL,

Appellants

v.

THE PULLMAN COMPANY, ET AL,

Appellees

REPLY BRIEF FOR APPELLANTS

(Railroad Commission of Texas, Lon A. Smith, Ernest O. Thompson, Jerry Sadler, and Gerald C. Mann)
AND FOR INTERVENING DEFENDANTS
(M. B. Cunningham, W. A. Worley, W. M. Hadley, and Order of Sleeping Car Conductors).

Appeal from the District Court of the United States for the Western District of Texas

FIRM FOUNDATION—AUSTIN

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1. The Plaintiffs' (Appellees') Suit Has Not Been Properly Brought as a Direct Attack.

The appellees state that "the present action, challenging the Commission's order. . . ., is a direct at-

tack." (Page 58, Brief for Appellees). This statement is apparently in answer to the appellants' request that the appellees advise the court whether they are bringing a direct or collateral attack in this case. (Page 42, Brief for Appellants).

We submit that a direct attack can only be brought in the manner provided by statute, and that manner is prescribed by Article 6453, as follows:

> "If any railroad company or other party at interest be dissatisfied with the decision of any rate, classification, rule, charge, order, act or regulation adopted by the Commission, such dissatisfied company or party may file a petition setting forth the particular cause or causes of objection to such decision, act, rate, rule, charge, classification, or order, or to either or all of them, in a court of competent jurisdiction in Travis County, Texas, against said Commission as defendant. . . ."

In the case of *Texas Steel Company* v. *F. W. & D. C. Ry. Co.*, 120 Tex. 597, the Supreme Court of Texas held that an order of the Railroad Commission of Texas regular on its face is "not subject to be called in question *except in a direct proceeding brought in full conformity with the provisions of Article 6453.*"

We pointed out in the Brief for Appellants, heretofore filed in this case, that in the case of *Henderson* v. *Terrell*, 24 Fed. Supp. 147, Judge Hutcheson held in a situation similar to this case that when they were

residents of Texas "*plaintiffs cannot maintain their suit as a statutory suit against the Commission in this (a Federal) Court. . . .*'" We believe that that position is further supported by the opinion of this court in the very recent case of *Railroad Commission of Texas* v. *Rowan & Nichols Oil Company*, 61 S. Ct. 343, 85 L. Ed. 321 (decided January 6, 1941, and not yet officially reported) in which it was said:

> "... In denying the petition for rehearing in the earlier cases we held that whatever rights the state statute may afford are to be pursued in the state courts."

As authority for the right to maintain a direct attack in the manner they seek to maintain it in this case the appellees cite the case of *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362; but, in that case there was a diversity of citizenship, and there is no such diversity in this case. In the Reagan case the court said:

> "... it may be laid down as a general proposition that, whenever a citizen of a State can go into the courts of a State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the Federal courts to maintain a like defense. A State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the State to protect property rights, a citizen of

another State may invoke the jurisdiction of the Federal courts."

In this case some of the plaintiffs are citizens of Texas, and all of the defendants are citizens, and therefore the rule in the Reagan case does not apply.

If the appellees (plaintiffs) have brought a direct attack, as they contend, in this case, then we submit that they are not entitled to an injunction enjoining the enforcement of the Railroad Commission's order for two reasons. *First*, the plaintiffs' (appellees') complaint does not allege that there was no substantial evidence *before the Railroad Commission* entitling it to pass the order in question. *Second*, it was not proved that there was no substantial evidence *before the Railroad Commission* to sustain its order.

We sincerely believe that the same error that was committed by the three-judge court in the second Rowan & Nichols Oil Company case was committed by the court in this case*, and that is that the trial court totally ignored the findings of fact of the Railroad Commission and the evidence before the Commission. If the findings of fact of the Railroad Commission are accepted at "face value" there are sufficient grounds to justify the order in question. As far as the three-judge trial court knew, and as far as this court knows, there was ample evidence before the Railroad Commission to support the order in-

*This case was the next case in the trial court after the Rowan & Nichols Oil Company case (reversed in 61 S. Ct. 343, 85 L. Ed. 321), and the same three-judge court tried both cases.

volved in this case. The three-judge trial court was never informed as to what amount or kind of evidence was before the Railroad Commission. We contend that for that reason the trial court is not entitled to enter a judgment holding that there was no substantial evidence before the Commission to sustain its order.

Without alleging that there was no substantial evidence to support the Commission's order, the plaintiffs (appellees) filed an independent suit asking the Federal court to determine as an original investigation from evidence before the court, and not from evidence before the Railroad Commission, whether said Federal court thought such order was wise or unwise. The plaintiffs (appellees) persuaded the trial court to ignore the evidence that had been considered by the Commission and to make its own investigation and substitute its own findings of fact. Thus, we have two separate and independent trials with wholly separate and different records of facts, two separate and diametrically opposed findings of facts, and two conflicting orders. We submit that such procedure is improper according to the Texas decisions. The Texas cases hold that "the only matter with which the courts are concerned is whether or not there was substantial evidence *before the Railroad Commission* to sustain its order in the premises." In the case of *Humble Oil & Refining Company* v. *Railroad Commission of Texas*, 112 S. W. (2d) 222, by the Texas Court of Civil Appeals, Third District, the court said:

"The Texas courts have consistently held that the only issue in a court review of the action of the commission in making administrative orders, rules, and regulations, is to determine whether there is any substantial evidence to support the order, rule, or regulation of the commission. It is a familiar rule of law that a jury's finding of fact is not reviewable in a direct proceeding on appeal, unless it is unsupported by evidence. The same is true of orders and findings of fact by a regulatory board or commission. The decision of such a board has at least as high standing in regard to finality as a verdict or finding of a jury. Texas Juris, Vol 3, p. 1088 et seq. Such has been the uniform holding of our courts with reference to valuations found by tax and equalizations made by the state superintendent of public schools; with regard to the granting or refusing of a permit of convenience and necessity to operate buses and trucks; and with regard to the rates of railroad companies and public utility companies. . . .

"This is in accord with the often-repeated rule that any order of the commission as to any matter within its jurisdiction shall be accepted under statutory provision as prima facie evidence of its validity. This means that when the order is challenged, the court will presume it to be valid, and will sustain it, unless the evidence clearly shows it to be unreasonable and unjust. The mere fact that the order in question may be unwise will not warrant a court in striking it down, so long as it is based on any substantial evidence. Brown v. Humble Oil & Ref. Co., 126 Tex. 296, 83 S. W. (2d) 935. 87 S. W. (2d) 1069,

99 A.L.R. 1107, 101 A.L.R. 1393; Rabbit Creek Oil Co. v. Shell Pet. Corp., Texas Civ. App., 66 S. W. (2d) 737; Falvey v. Simms Oil Co., Tex. Civ. App., 92 S. W. (2d) 292, and Smith County Oil & Gas Co. v. Humble Oil & Refining Co., 112 S. W. (2d) 220, decided by this court May 19, 1937, and wherein it was held, as follows: 'Under the repeated holdings of this court and of the Supreme Court, under such circumstances, *the only matter with which the courts are concerned is whether or not there was substantial evidence before the Railroad Commission to sustain its order in the premises.*'" (Italics ours)

The same rule was stated by this court in the case of *Railroad Commission of Texas* v. *Rowan & Nichols Oil Company*, 61 S. Ct. 343, 85 L. Ed. 321, *supra*, in language as follows:

"... Nor, on the basis of intrinsic skills and equipment, are the federal courts qualified to set their independent judgment on such matters against that of the chosen state authorities. For its own good reasons Texas vested authority over these difficult and delicate problems in its Railroad Commission. ... Indeed, we are asked to sustain the district court's decree as though it derived from an ordinary litigation that had its origin in that court, and as though Texas had not an expert Commission which already had canvassed and determined the very issues on which the court formed its own judgment. For *it appears that the court below nullified the Commission's action without even having the record of the Commission before it.* When we consider the limiting conditions of litigation—the adapt-

> ability of the judicial process only to issues definitely circumscribed and susceptible of being judged by the techniques and criteria within the special competence of lawyers—it is clear that the Due Process Clause does not require the feel of the expert to be supplanted by an independent view of judges on the conflicting testimony and prophesies and impressions of expert witnesses." (Italics ours)

Thus, we see that the appellees' (plaintiffs') suit has not been properly brought as a direct attack. The appellees (plaintiffs) have brought a collateral attack in this case; but, under the rule stated in the cases of *Texas Steel Co.* v. *F. W. & D. C. Ry. Co.*, 120 Tex. 597, and *Railroad Commission of Texas* v. *Beaver Reclamation Oil Co.*, 132 Tex. 27, the appellees are not entitled to enjoin the order in question because "an order regular upon its face made by the Commission is not subject to collateral attack." The order in this case is clearly regular on its face.

2. Rates and Fares.

The appellees deny that they are collecting more than three cents per mile from passengers. (Page 50, Brief for Appellees). However, the record shows that the regular passenger fare is two cents per mile (R. 240); and in addition to said two cents per mile a person who rides in a Pullman car must pay an extra one cent per mile and also an additional seat accommodation charge. (R. 139, 140). This makes

total of more than three cents. The witness B. H. Norman testified:

"Q. All right. Then, for the privilege of riding in the Pullman car the Railroad Company does charge an extra fare, you know that, don't you?

"A. Yes, sir.

"Q. That is one cent a mile, isn't it, in Texas?

"A. I believe it is.

"Q. Then in addition to paying that extra railroad fare to ride in the Pullman car, the Pullman Company then charges an additional fare?

"A. They charge for their accommodations.

"Q. Well, that is an additional charge, though, in addition to the railroad fare, and then the extra fare to ride in the Pullman?

"A. It is an additional expense to the passengers. You can't go to the theater without paying for it, and if you ride in a Pullman car you must pay for a seat or berth; that applies on both roads and on all roads." (R. 139, 140)

As pointed out in the Brief for Appellants, such a charge in excess of three cents per mile is a violation of Article 6416 of the Revised Civil Statutes of Texas. It also constitutes extortion in violation of

Article 6473 of the Revised Civil Statutes of Texas. We believe that the Railroad Commission is entitled to take jurisdiction over such matter by virtue of Article 6448 of the Revised Civil Statutes which provides that the Commission shall "correct abuses and prevent unjust discrimination and *extortion in rates* of freight and *passenger traffic* on the different railroads in this State."

The appellees contend that the order in question is a rate order. If it is a rate order it does not attempt to change any *legally established rate* because the rates and charges now being made by the Pullman Company are illegal and extortionate, as pointed out above, and they have never been authorized by the Railroad Commission.

This court in the case of *Tagg Bros. & Moorhead v. United States*, 280 U. S. 420, said:

> "A rate order is not *res judicata*. Every rate order made may be superseded by another."

If it should be held that this is a rate order, it is subject to be changed by the Railroad Commission from time to time.

The contracts between the Pullman Company and the railroads provide that the profits derived from these illegal rates shall be split between the parties to the contracts. These contracts, based on these

illegal excess fares, constitute the basis of the appellees' (plaintiffs') suit. Such a suit cannot be maintained.

3. On the Question of Notice.

The appellees contend that the Railroad Commission did not give the proper notice before it held a hearing in this case. The statute (Article 6449) only requires notice "before any rates shall be established." We do not believe any rates were established in this case. Therefore, we doubt that the notice statute (Article 6449) is involved. But, regardless of whether or not any rates were established, we believe that said statute would only require notice to be given to Texas Railroads, as a non-Texas corporation cannot operate a railroad legally in Texas (Article 6260), and we believe such notice was given. The Railroad Commission's order recites that notice was given. (R. 38) The order also recites that attorneys for the Pullman Company and an attorney for all "Texas railroads" appeared at the hearing (R. 38, 39); and such finding is not contested by the appellees, and therefore we submit it must be accepted as true. In the case of *Falvey* v. *Simms Oil Co.*, 92 S. W. (2d) 292, by the Texas Court of Civil Appeals, Third District, the court said:

> " . . . any order of the Commission as to any matter within its jurisdiction shall be accepted under statutory provision as prima facie evi-

dence of its validity."

Regardless of what form of notice was sent to the Texas railroads, whether by formal citation, letter or telephone call, the fact that they appeared (which fact is not denied) prevented any injury to them because of any defectiveness in the form of the notice. They appeared, and the purpose of the notice statute was served.

The appellees seem to think that notice should have been given to everyone, including the porters. But, the law is to the contrary, according to the case of *Houston Chamber of Commerce* v. *Railroad Commission of Texas*, 19 S. W. (2d) 583, by the Texas Court of Civil Appeals, Third District, (affirmed by the Supreme Court of Texas in 124 Tex. 375) in which the court said:

> "In the hearing before the Commission, the only notice that is required is that given to the railroad companies, whose interests are affected. Shippers, localities, and others who may be affected or interested are not required to be given notice."

Another reason why no question can be raised about the notice in this case is that sufficiency of the notice cannot be questioned in a collateral attack. The appellees' (plaintiffs') suit is a collateral attack, as heretofore pointed out. In the case of *Texas Steel Company* v. *F. W. & D. C. Ry. Co.*, 120 Tex. 597, referred to above, the court said:

"As shown by the certificate the Steel Company contends that the orders of the Railroad Commission are utterly void, because (a) made without notice to the railroads, (b) because no notice was given to the Steel Company. . . . All of these contentions are utterly untenable. . . .

"Under the plain and simple terms of article 6452 it is provided that all rates prescribed by the commission shall be conclusive as between private parties and railway companies, until found otherwise in a direct action. . . .

"Under the provision of article 6453 it is expressly provided that any party dissatisfied with any decision of the commission may attack the same by a direct proceeding or suit in Travis County, Texas, in which suit the Railroad Commission must be made a party. . . .

"If an order of the commission regular on its face can be collaterally attacked on the ground of want of notice, or any other ground here urged, then the orders and rates of the commission could be rendered null and void in a proceeding in which the commission was never given an opportunity to be heard either on the facts or the law. Furthermore different courts might reach conflicting conclusions as to the facts involved in the same order. This demonstrates the wisdom of the statute, and the correctness of the rule here announced. The Legislature recognized in the beginning that to allow such attacks would lead to intolerable results, and foreclosed the right to do so by the statute prescribing the manner and the court in which the rules and rates of the commission can

be subjected to judicial review. . . . What we hold is that the orders here attacked are not subject to be called in question except in a direct proceeding brought in full conformity with the provisions of article 6453, supra."

4. The "Full Crew Law" (Article 6380) Does Not Prevent the Railroad Commission of Texas From Passing Orders to Correct Abuses Under Articles 6445, 6448 and 6474.

The appellees seem to argue that Article 6380 of the Revised Civil Statutes of Texas, known as the "Full Crew Law," which prescribes that there must be a crew of at least four persons on a passenger train, impliedly prohibits the Railroad Commission from passing the order in question that requires a Pullman conductor on certain trains. (page 74, Brief for Appellees)

We submit that Articles 6445, 6448 and 6474 of the Revised Civil Statutes of Texas authorize the Railroad Commission "to . . . regulate . . . railroads . . . and to prevent . . . abuses in the conduct of their business."* We have pointed out in the Brief for Appellants, heretofore filed, that the order in question is a correction of an abuse of the kind defined by the Legislature of Texas.

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*A note on the opinion of the trial court in this case (33 Fed. Supp. 675), commenting on the authority of the Railroad Commission of Texas, has been published in the December, 1940, issue of the TEXAS LAW REVIEW, Vol. XIX, page 86.

The "Full Crew Law" is designed to contribute to the safe operation of the physical equipment of the train, while the order in question is for the safety and protection and welfare of the passengers who pay the extra fare to ride in the Pullman cars.

The Legislature apparently believed that there should be a crew of at least four men on all passenger trains and therefore it passed the "Full Crew Law" (Article 6380); and it also believed that abuses, particularly discriminations, should be prevented, and it authorized the Railroad Commission to correct certain abuses whenever they appeared. We submit that that authority would allow the Railroad Commission to require another man on certain passenger trains, even in addition to the four prescribed by the "Full Crew Law," if such was necessary to prevent an abuse defined by the Legislature; and such was clearly necessary in this case.

The Legislature believed that in all cases there should be a minimum crew of four men on passenger trains, but it also authorized the Railroad Commission to require an additional man in certain instances, to-wit, where it was necessary to correct certain abuses, and this is one of those instances.

5. No Race Question is Involved in This Case.

The appellees in desperation for some tangible and logical basis to sustain the clearly erroneous de-

cision of the trial court attempt to raise the race question, no doubt in the hopes of trying to prejudice this honorable court. No other purpose could be effected by the matters set out on page 80, and elsewhere, of their brief.

The complete answer to this fallacious argument is that the order nowhere requires that the Pullman conductors be white men. The Pullman Company and the railroads are left completely free to select men or women of their own choosing as Pullman conductors. They may be of any race or color, and there is nothing in the findings of fact of the Railroad Commission even to suggest that there would necessarily follow any race discrimination. If there had been, no doubt able counsel would have pointed it out to this court in forceful language. The only thing the order does require is that the Pullman cars shall be supervised by some one,—whether white or black being left entirely and exclusively to the employers.

6. Opportunity for Personal Observation of Witnesses by Railroad Commissioners.

In the footnote on page 16, and also on page 85, of the Brief for Appellees it is contended that great weight should be given to the findings of the three-judge Federal trial court because the judges of said court had the opportunity personally to observe the witnesses and thereby had a better opportunity to make correct findings of fact. Does not the same

argument apply to the Railroad Commission hearing? Did not the Commissioners have the same opportunity to observe the witnesses? The answer is "Yes."

The Railroad Commission had a complete hearing in which, according to the order, the testimony of *seventeen witnesses* was heard. (R. 39) Then the three-judge Federal Court had another hearing, unconnected with the Commission's hearing, and without knowing what the seventeen witnesses testified to before the Commission, the three-judge Federal court substituted its own motion as to what constituted the facts. We submit that such procedure was improper under the rule stated in the case of *Radice* v. *New York*, 264 U. S. 292, as follows:

> "The legislature had before it a mass of information from which it concluded that night work is substantially and especially detrimental to the health of women. We cannot say that the conclusion is without warrant. . . . Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker."

Conclusion

For the reasons stated, it is respectfully prayed

that the judgment of the District Court be reversed.

Respectfully submitted,

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